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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE M. BAREFORD, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the petition for certiorari should be denied where the lower courts properly applied Supreme Court precedent in dismissing a product liability action on state secrets grounds and where there is no conflict among the circuits in their application of the state secrets privilege.

STATEMENT OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Pursuant to Sup. Ct. R. 29.1, Respondents hereby identify all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

General Dynamics Corporation—None

Hughes Aircraft Company—General Motors Corporation, EDS, ACCSCO S.A., American Mobile Satellite Corporation, AMRAAM International Licensing Company, ARINC Incorporated, Comlinear Corporation, Earth Observation Satellite Company, ELEK-LUFT Elektronik-und Luftfahrtgerate GmbH, EL-TRO GmbH, Empresa Nacional de Optica SA, First Portland Technology Corp., FLIR Systems, Inc., FLIR Systems, Inc., Guiado y Control SA, H & D Radio Frequency Identification Products, H & R Company, HBH Company, H. E. Microwave Corporation, HKV, HESI-FTIC Environmental Sciences, Inc., Hughes Environmental Systems-Federated Technologies Mississippi, Inc., Hughes-JVC Technology Corporation, Hughes-Kenwood RDSS, Inc., Hughes Software Systems Private Limited, i-Logix, Inc., Interactive Entertainment, Inc., International Electro-Optical Industry Anonim Sirketi, International Mobile Machines Corporation, Japan Communications Satellite Company, Inc., Japan Satellite Communications Network Corporation, MET, Microelectronics and Computer Technology Corporation, Nippon Avionics Co., Ltd., Pacific Monolithics, Inc., SJ & LA Associates, Software Productivity Consortium, Inc., UKADGE Systems Limited.

Unisys Corporation—Nihon Unisys, Ltd. (Japan), Tata Unisys, Ltd. (India)

Lockheed Electronics Company (Lockheed Sanders, Inc., successor by merger)—Lockheed Corporation

Vitro Corporation—PCC Technical Industries, Inc., GK Technologies, Inc., Pennsylvania Company, The Penn Central Corporation, The Charter Company, Spelling Entertainment, Inc., Chiquita Brands Inter-

national, Inc., American Financial Enterprises, Inc., Buckeye Partners, L.P., DI Industries, Inc., Sprague Technologies, Inc., Great American Communications, Inc., The Circle K Corporation, Provident Bancorp, Inc., Marsh Supermarkets, Inc., National Convenience Stores Incorporated, Sunshine—Jr. Stores, Inc.

Teledyne Inet, a division of Teledyne Industries Incorporated—Teledyne, Inc., Teledyne Canada, Limited

RCA Corporation, Government Systems Division—General Electric Company, Dart & Kraft Financial Corporation, GECC Financial Corporation, General Electric Capital Corporation, General Electric Capital Canada, Inc., General Electric Credit International, N.V., General Electric Financial Services, Inc., General Electric Overseas Capital Corporation, Montgomery Ward Credit Corporation, Montgomery Ward & Co., Inc., CAMCO, Inc. (Canada)*

Raytheon Company—PT HAS Service (Indonesia), Seismograph Service (Malaysia) Sdn. Bhd., Compania Mexicana de Exploraciones S.A., Seismograph Saudi Arabia Limited, Seismograph Service (Nigeria) Limited, Stearns Catalytic Ingenieria Y Construccion Chile, Limitada, Switchcraft De Mexico S.A. De C.V., Switchcraft Far East Company, Travel Air Insurance Co., Ltd., Raytheon Saudi Arabia Limited, New Japan Radio Co., Ltd., Compagnie des Tubes Electroniques (COMET), Process Industry Engineering (Pty) Ltd., ComLog Gesellschaft Fur Logistik GmbH, UME/SMAS, Raytheon Marine Sales and Service Company, Systems for Defense Company, Thoray Electronics, Inc., Digital Techniques, Inc., Bipolar Integrated Technologies, PerSeptive Biosystems, Inc., Militech, Speech Systems, Inc., Steinbrecker Corp., Sciteq Electronics, Inc., Cross Check Technology, Inc., Beta Phase, Inc., Sepracor Inc.

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* This list represents those RCA Corporation parents, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

FMC Corporation—FMC Corporation, FMC Gold Corporation

Rockwell International Corporation—None

Cardion Electronics—Ferranti International, Inc.

Advanced Technology, Inc., d/b/a PRC Inc.—Black & Decker Corporation, PRC Technology Services 1 of Virginia, Inc., PRC Technology Services 2, Inc., PRC Inc.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises from a wrongful death action against manufacturers of missile defense systems and other equipment on board the U.S.S. STARK, which was hit by two missiles from an Iraqi fighter on May 17, 1987 in the Persian Gulf. The district court dismissed the action on two grounds: (1) that the action was not justiciable under the political question doctrine, and (2) that dismissal was required under the state secrets doctrine. The United States Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal based on the state secrets ground, and did not reach the political question ground.[1] *Bareford v. General Dynamics Corp.*, 973 F.2d

[1] The political question ground of dismissal relied upon by the district court, but not reached by the Fifth Circuit, is not raised by the Petition for Certiorari.

1138 (5th Cir. 1992), *aff'g* No. G-90-118(SBK) (S.D. Tex. Feb. 25, 1991) (both opinions set forth in Pet. App.), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 12, 1993) (No. 92-1209). The Fifth Circuit's affirmance on state secrets grounds followed the Second Circuit's affirmance of a district court's dismissal of an almost identical product liability suit arising out of the same incident. *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991), *aff'g* 755 F. Supp. 1134 (D. Conn. 1990).

SUMMARY OF THE ARGUMENT

The requirements for a petition for certiorari are not satisfied here. There is no conflict among the circuits to justify Supreme Court review, and the courts below properly applied Supreme Court precedent in dismissing this action where plaintiffs could not prove their prima facie case without access to information properly protected by the state secrets privilege. The Petition for Certiorari is based on an alleged split among the circuits in the application of the state secrets doctrine. The Petition attempts to create the illusion of such a split by an appendix listing differing outcomes in cases in which the state secrets privilege was asserted. (Pet. App. at 37a-42a.) However, this superficial analysis does not establish a true conflict among the circuits, but merely reflects the widely different factual and procedural circumstances of the cited cases.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION FULLY COMPORTS WITH THIS COURT'S DECISIONS.

Petitioners assert that the decisions below are somehow inconsistent with this Court's requirements for the state secrets privilege, but this assertion is made in vague generalities and without support in the record. In fact, while Petitioners can disagree with the result below, they cannot point to any substantive or procedural aspect of

the Fifth Circuit's decision which violates this Court's precedents. Indeed, the courts below followed governing precedents to the letter.

A. The Courts Below Applied the Correct Procedural and Substantive Standards to the Executive's Invocation of the State Secrets Privilege.

This Court established the procedural and substantive requirements for invocation of the state secrets privilege in *United States v. Reynolds*, 345 U.S. 1 (1953). Procedurally, the privilege is properly invoked if there is "[1] a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, [3] after actual personal consideration by that officer." *Id.* at 7-8. Substantively, the privilege is properly invoked if the government shows that the disclosure of the information poses a "reasonable danger" to secrets of state. *Id.* at 10.

There can be no doubt that the lower courts applied the procedural requirements correctly. As required by *Reynolds*, the United States invoked the state secrets privilege by making a "formal claim of privilege" in the Declaration of the Secretary of the Navy, H. Lawrence Garrett, III, who was undeniably the "head of the department which has control over the matter," and whose Declaration was expressly made "after actual personal consideration" by Secretary Garrett, as required by *Reynolds*. (Opp'n App. at 1a-2a, 12a).[2]

Petitioners' only quibble with the procedural aspects of Secretary Garrett's Declaration is not with the standard applied by the courts below, but is based on the fact that Secretary Garrett did not specifically review all 2,500 pages upon which Petitioners purport to rely. This page-by-page review is not required by *Reynolds*, and Secretary Garrett's Declaration sets forth in considerable

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[2] The Garrett Declaration is reproduced in its entirety in the Appendix to this Brief, and is cited herein as "Opp'n App."

detail the types of documents Petitioners would need and the reasons those documents cannot be disclosed. (Opp'n App. at 2a-12a.)[3]

The courts below also applied the correct substantive standard in assessing the propriety of the assertion of the state secrets privilege here. The substantive standard as set forth by this Court in *Reynolds* is whether the government has shown that the release of the information poses a "reasonable danger" to national security. *Reynolds*, 345 U.S. at 10. Again, this is precisely the standard applied by the Fifth Circuit, as its opinion makes clear: "The privilege for state secrets allows the government to withhold information from discovery when disclosure would be inimical to national security." (Pet. App. at 5a (citing *Zuckerbraun* and *Reynolds*).) The district court also applied the same standard: "Based on the briefs and exhibits presented from both sides, this court agrees with the holding in *Zuckerbraun* that 'it is apparent from all the circumstances involved that there is a reasonable danger that disclosure of the information in question would pose a threat to national security.'" (Pet. App. at 25a (quoting *Zuckerbraun*, 755 F. Supp. at 1139; citing *Reynolds*).)

Again, there can also be no doubt that, in addition to applying the correct substantive standard, the lower courts reached the correct result. Secretary Garrett's Declaration set forth in great detail the reasons why disclosure of the information at the heart of Petitioners'

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[3] Petitioners' assertion that the courts below "abdicated" their judicial responsibility by accepting "uncritically" the government's assertion of the state secrets privilege (Pet. at 11, 12) is refuted by the lower courts' opinions themselves. For example, the district court explained that it was satisfied "from *all* the circumstances," i.e., the parties' submissions in addition to the Declaration, that the information identified in the Declaration is crucial to the national security. (Pet. App. at 25a (quoting *Reynolds*, 345 U.S. at 10; *Zuckerbraun*, 755 F. Supp. at 1139) (emphasis added).)

case would pose a "reasonable danger" to the security of the United States. (*See* Opp'n App. at 10a-11a.)[4]

Accordingly, the decisions below correctly followed this Court's requirements for invocation of the state secrets privilege, and the Petition for Certiorari on this ground should be denied.

B. Dismissal of the Action Below Is Fully Consistent with This Court's Precedents.

Petitioners argue that, even if the state secrets privilege were properly invoked, the courts below should have allowed the action to go forward without the privileged material. This argument is not a proper basis for a petition for certiorari. Petitioners cannot point to any decision of this Court which is inconsistent with dismissal where plaintiffs cannot prove their prima facie case without access to privileged information. Petitioners' argument amounts only to a disagreement with the *result* of the lower court's analysis, not with the analysis itself.

There can be no doubt that under this Court's decisions dismisal of an action is appropriate where, as here, the very substance of the action is a state secret or where, as here, plaintiffs cannot prove their prima facie case without access to the privileged information. *Totten v. United States*, 92 U.S. 105, 107 (1875).[5]

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[4] Petitioners' argument that the Secretary was required to review their proffered data to properly invoke the privilege is simply unsupported by the case law. Secretary Garrett personally considered the subject matters and categories of classified information in properly invoking the privilege. Moreover, as the Garrett Declaration makes clear, the privilege covers materials which were classified according to Executive Order 12356. (Opp'n App. at 2a.)

[5] Petitioners argue repeatedly that this Court has not ruled in the state secrets area since *Reynolds*, as if this were an appropriate ground for issuing a writ of certiorari. In any event, this Court's recent reaffirmance of the principles of *Reynolds* and *Totten*, rendered almost thirty years after *Reynolds*, puts this issue to rest. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,

Although Petitioners repeatedly *assert* that they made out a prima facie case in their declarations and 2,500 pages of newspaper articles and similar documents, they never demonstrate how that case is, in fact, made by their submission. As both the district court and Fifth Circuit found, Petitioners' submissions fall well short of the showing required to meet their burden of proof. For example, the Fifth Circuit found that "Bareford has come forward with substantial evidence from which a judge or jury might find problems, or even wrongdoing, by General Dynamics in its production and testing of the Phalanx system. That alone will not establish a prima facie case." (Pet. App. at 9a.)[6]

Likewise, the district court, after reviewing Petitioners' evidence and the Garrett Declaration, determined that:

> To prove the allegations in their complaint, they would have to delve into the specifications and capabilities of the radars and other defense systems, the crucial details of which are classified. The type of information classified in each of the several defense systems are discussed in the Secretary's declaration. The details essential to plaintiffs' claims are classified.
>
> Further, to prove that the alleged defective products were the proximate cause of the ship's failure to

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454 U.S. 139 (1981), in holding that the Navy need not file an environmental impact statement which would reveal classified information posing a threat to national security, this Court reiterated its previous holding that " 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.' " *Id.* at 146 (quoting *Totten*, 92 U.S. at 107; citing *Reynolds*).

[6] Notably, the evidence proferred regarding product defects was directed only to General Dynamics, and not to any other defendant in this case.

> successfully defend herself against the attack, the ROE [rules of engagement] would have to be examined to ascertain the applicable orders when the STARK is aware of an approaching aircraft and to what extent those orders were followed. The applicable ROE contained in the Navy Report of Investigation are classified.

(Pet. App. at 28a.)

Finally, Petitioners' attempt to create a constitutional issue grounded in the right of access to the courts is also a red herring. Petitioners appear to assume that the right to sue is unconditional, a proposition which is unsupported and which directly conflicts with, among others, this Court's decisions in *Totten* and *Catholic Action*.

II. THERE IS NO CONFLICT AMONG COURTS OF APPEAL ON THE ISSUES PRESENTED BY PETITIONERS.

Supreme Court Rule 10.1(a) provides that certiorari may be granted to resolve a conflict among the circuits on a matter of federal law. "This means that there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., *Supreme Court Practice* 196 (6th ed. 1986). Petitioners have identified *no* such conflict among the circuits as to the propriety of dismissal when, as here, plaintiffs cannot establish a prima facie case without revealing state secrets. Petitioners' description of the existing case law on state secrets as "chaotic, conflicting, and at times . . . 'potentially frightening'" (Pet. at 8 (quoting *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 283 (4th Cir. 1980) (Murnagham, J., dissenting)) is inaccurate and misleading. It ignores a long history in which the circuit courts have uniformly and consistently applied Supreme Court precedent on the state secrets doctrine to different facts and circumstances. Indeed, the two circuits considering the state secrets doctrine on the facts in issue here

reached precisely the same result through a similar application of the state secrets privilege.

The Fifth Circuit in this case affirmed dismissal. After determining the validity of the privilege asserted, the *Bareford* court applied a two-part analysis. First, the court evaluated the nonprivileged evidence offered by Petitioners against their allegations, and found that the evidence "will not establish a prima facie case." (Pet. App. at 9a.) The court likewise found that Petitioners' evidence of the intended operation of the missile defense system does "*not* prove that the Phalanx system was intended to destroy the Iraqi missile in these circumstances, much less to prove why it failed to do so." (*Id.* (emphasis added).) Such proof would require "the type of judicial disclosure of state secrets the doctrine blocks." (*Id.*) Moreover, the court found that "[p]laintiffs have failed to demonstrate that this evidence is available to them as unclassified information. Accordingly, we conclude that dismissal was appropriate." (*Id.*)

The Second Circuit's opinion in *Zuckerbraun* is on all fours with the Fifth Circuit's *Bareford* opinion. In *Zuckerbraun*, the court affirmed dismissal of a wrongful death action arising out of the STARK incident after considering the same Declaration as here because the factual questions concerning liability "cannot be resolved or even put in dispute without access to data . . . . [which] is in its entirety classified and subject to the claim of privilege. *The very subject matter of this action is thus a state secret and there is no evidence available . . . to establish a prima facie case.*" *Zuckerbraun*, 935 F.2d at 547-48 (emphasis added) (citing *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten*)).

Petitioners' appendix, listing several cases in which a court did not dismiss the action, does not reflect any conflict in the law regarding whether dismissal is an appropriate remedy where the state secrets privilege has been invoked. (*See* Pet. App. at 37a-42a.) No circuit

court, including the Fifth Circuit in this case, has ever held that dismissal must *inevitably* follow an assertion of the state secrets privilege. As the District of Columbia Circuit explained, "the outcome of a particular case depends on the purpose that the privileged information would have served. If the information is essential to establishing plaintiff's prima facie case, dismissal is appropriate." *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), *cert. dismissed*, 493 U.S. 960 (1989); *accord Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243 (4th Cir. 1985) ("Once the state secrets privilege has been properly invoked, the district court must consider whether and how the case may proceed in light of the privilege."). Thus, the effect of the privilege on a lawsuit is determined on a case-by-case basis, and what Petitioners perceive as a "lack of uniformity" among the courts (Pet. at 16) is merely a difference in outcomes based on differing facts.

Specifically, the circuits agree that dismissal is necessary when, as here, a plaintiff cannot make out a prima facie case without privileged evidence. For example, in *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982), dismissal was affirmed after it became clear that plaintiffs lacked Article III standing because the information necessary to establish injury was privileged. *Id.* at 998-99; *see also Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983) (dismissal is proper when plaintiff cannot establish prima facie case without privileged information), *cert. denied*, 465 U.S. 1038 (1984). The Fourth Circuit recently affirmed summary judgment for a defendant in *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991), where the government asserted the privilege after preliminary discovery efforts proved unworkable under a protective order in a lawsuit for tortious interference with business.

> [I]n view of our holding that the evidentiary privilege was properly invoked, the correctness *vel non* of the summary judgment must be gauged on the present record without opportunity for further evidence. . . . "If the assertion of the privilege leaves

> plaintiff without sufficient evidence to satisfy a burden of persuasion, plaintiff will lose."

Id. at 1289 (quoting *Farnsworth Cannon*, 635 F.2d at 271-72).

The circuits also agree with the Fifth Circuit that dismissal is necessary when the core issues of a case are inextricably bound to the privileged material and trial will inevitably lead to disclosure of state secrets. In *Fitzgerald*, the Fourth Circuit affirmed dismissal of a defamation action because proving the truth or falsity of the libel would compromise state secrets. The court held that "the very subject of this litigation is itself a state secret. Because there was simply no way this particular case could be tried without compromising sensitive military secrets, we conclude that the district court did not err in ruling that the case must be dismissed." *Id.* at 1243 (footnote omitted); *see id.* n.11 ("[T]ruth or falsity of a defamatory statement is the very heart of a libel action."). In dismissing, the court followed the Supreme Court precedent set forth in *Totten v. United States*, 92 U.S. 105 (1875), where the existence of a contract to spy on confederate troops between the plaintiff and President Lincoln was deemed to be "a fact not to be disclosed." *Id.* at 107.

In *Bowles v. United States*, 950 F.2d 154 (4th Cir. 1991), the court held that when the subject matter of the litigation is privileged, and when "no amount of effort or care will safeguard the privileged information," dismissal is warranted. *Id.* at 156; *see also Molerio v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1984) (dismissal affirmed because "the whole object of the suit and of the discovery is to establish a fact that is a state secret"); *Salisbury v. United States*, 690 F.2d 966, 977 (D.C. Cir. 1982) (dismissal affirmed because " 'litigation [would] lead to the eventual discovery of privileged matters,' " and was not employed as a sanction under Fed. R. Civ. P. 37 for refusal to provide discovery) (quoting unreported decision below)).

In summary, the circuits agree that dismissal is appropriate and necessary under *Reynolds* and *Totten at any stage in the litigation* when it becomes clear that plaintiffs cannot prove their prima facie case without classified information, or the very subject matter of the litigation is privileged and further litigation would inevitably endanger secrets of state.

With respect to Petitioners' list of cases which did not result in dismissal (Pet. App. at 37a-42a), the differences in result stem from their facts, i.e., dismissal was either not in issue, or was inappropriate because the privileged material was not central to proof or defense. *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984) (affirming a quash on subpoenas to the government on state secrets grounds; dismissal not sought); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977) (dismissal not sought). For example, the D.C. Circuit refused to direct dismissal under mandamus because "plaintiff's claim did not present a case where 'the very subject matter of [the] litigation is itself a state secret.'" *In re United States*, 872 F.2d at 478 (quoting lower court's memorandum); *see also Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958) (finding a limited statutory waiver of the state secrets privilege under the Invention Secrecy Act of 1951); *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979) (following *Halpern*, remanded suit under 35 U.S.C. § 183 for trial after need for secrecy passed).

Simply put, there is no conflict among the circuits as to the law regarding the state secrets privilege. Given the extreme sensitivity of both the privileged information itself and the balance between the two branches of government, the cases have been handled with remarkable consistency among the circuits. Moreover, Petitioners' statement that the courts have "experimented in their attempts to satisfactorily resolve the competing constitutional interests" (Pet. at 8) reflects a highly appropriate

and healthy process in which this Court has no need to intrude. The courts uniformly apply the legal parameters established by Supreme Court precedent, fashioning the appropriate remedies to the facts of each case. Thus, there is no basis for granting Petitioners' request for certiorari.

CONCLUSION

For the above reasons, Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

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APPENDIX

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DECLARATION AND CLAIM OF THE STATE SECRETS PRIVILEGE OF H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY

I, H. LAWRENCE GARRETT, III, HEREBY DECLARE:

1. I am currently the Secretary of the Navy of the United States of America and the chief executive officer of the Department of the Navy. In this capacity I possess original TOP SECRET classification authority; this means that I am authorized by the President under Executive Order 12356 to determine the proper classification of information through the level of TOP SECRET on behalf of the United States.

2. As Secretary of the Navy, I am responsible for the administration of all activities within the Department of the Navy. The official activities of the Department of the Navy are many and diverse, but all have a single objective—the preservation of national security. In order to best achieve that objective, the Navy employs numerous weapons systems, defensive systems and other technical devices aboard warfighting ships around the world. These systems which are mounted on our ships and other weapons platforms are the foundation of the warfighting apparatus that provides the ultimate safeguard for our national security and means of carrying out our national foreign policy. Such systems were mounted on board the USS STARK in 1987.

3. USS STARK (FFG-31) is an Oliver Hazard Perry (FFG-7) class frigate. This class of ship comprises the United States' most advanced frigate. There are fifty-one (51) Oliver Hazard Perry class frigates commissioned; those frigates are the largest class of surface combatants in the U.S. Navy. Furthermore, USS STARK

and sister ships of the class are expected to be the United States' primary class of frigates well into the 21st century.

4. I have been advised of the pendency of the lawsuits filed in the United States District Courts for the Southern District of Texas (*Bareford v. General Dynamics, et al.*) and the District of Connecticut (*Zuckerbraun v. General Dynamics, et al.*) relating to the attack on the USS STARK on 17 May 1987 while that ship was operating in the Persian Gulf. I have reviewed the pleadings which contain allegations regarding the inadequate design, manufacture, testing and installation of shipboard weapons and defense systems on the USS STARK. I have concluded that litigation involving these allegations would of necessity require examination of the use and capabilities of these systems as well as the "rules of engagement," the orders the ship commanders operate under in determining whether and when to employ weapons and defensive systems. The Rules of Engagement and many features of the weapons systems relevant to the litigation of these suits are properly classified in accordance with Executive Order 12356, and the disclosure of this information reasonably would be expected to cause measurable damage to the national security of the United States.

5. Attorneys for the United States have reviewed with me the types of information that plaintiffs would require in order to establish legally sufficient claims. I have personally reviewed the classification of those types of information and determine that its disclosure would cause damage to the national security of the United States as further described below.

6. The types of classified information to which plaintiffs would require access to prove their *prima facie* case against the various defendants include:

a. The rules of engagement authorized for, and military operational orders applicable to, USS STARK at the time of the incident; and

b. General technical information regarding the design, performance and functional characteristics of combatant ships and the weapons and defense systems installed thereon, including operational and tactical tests and evaluations, and hardware applications and descriptions.

The classified aspects of several of the pertinent systems are more specifically set forth below.

7. The rules of engagement authorized for, and military operational orders applicable to USS STARK at the time of the incident are classified information. Rules of engagement and operational orders instruct commanders as to the circumstances under which—and the extent to which—they may employ weapons and defensive systems. Rules of engagement are based upon factors which include combat systems doctrine and intelligence estimates. In this case, the STARK's rules of engagement were tailored based upon threat assessments she was expected to face. Rules of engagement are classified in order to prevent potential aggressors from determining the circumstances under which—or the extent to which—U.S. forces will engage them.

8. General technical information regarding the design, performance and functional characteristics of combatant ships, when associated with specific tactical situations, constitutes classified information.

9. Design, performance, and functional characteristics of shipboard radar systems are classified, insofar as they pertain to:

a. Systems accuracy, including range, height, and bearing;

b. Range, including the maximum acquisition and tracking range;

c. The maximum altitude and elevation angle;

d. Radio frequency coverage;

e. Pulse lengths;

f. Antenna characteristics (horizontal and vertical beam with polarization);

g. Resolution (azimuth and range);

h. Waveform;

i. Pulse modulation characteristics and power output;

j. Systems capacity as to target capacity, data rate, or false alarm rate;

k. Design information as to threat recognition time; minimum discernible signal; signal processing; and modulation sensitivity and techniques;

l. Electronic Counter-Measures and Counter-Counter Measures (ECM/ECCM) capability as to:

(1) design and achieved goals;

(2) specification requirements;

(3) circuitry employed to obtain capabilities; and

(4) vulnerability to ECM.

m. Radar system reliability as to data concerning mean time between failures (MTBF) or mean time to repair (MTTR), or the level of reliability achieved by the radar system; and

n. Vulnerability of the radar system to blast, shock and other forms of counter-measures other than electronic counter-measures (ECM).

10. Operational and tactical performance features of shipboard radar systems are classified. (The term "performance" is specifically defined as: radar system accuracy in locating targets; or multiple target discrimination/resolution capability; or detection and probability of false alarm and target cross section are included; or target detection range when both probability of detection

and probability of false alarm and target cross sections are included; or antenna gain, sidelobe structure and scan characteristics.)

11. Shipboard radar system hardware is classified whenever disclosure of the hardware itself reveals classified aspects of the system such as those described above.

12. Design, performance, functional characteristics, and tactical or operational test data of the AN/SLQ-32(V)2 Electronic Counter-measure System is classified. The SLQ-32(V) counter-measures set is a 3-variant family of electronic warfare systems for defense of ships against the anti-ship cruise missile threat. The SLQ-32(V)2 provides operational capability for early warning of threat weapon system emitters; threat information to own ship hard-kill weapons; automatic dispensing of chaff centroid decoys; and active electronic counter-measures to alter radio frequency homing missile trajectories to achieve a miss. The following design performance and functional characteristics of this system are classified:

a. Accuracy:

(1) identification; and

(2) direction finding.

b. Control: interface with the Navy Tactical Data System (NTDS).

c. Range:

(1) of intercept; and

(2) target classification versus range capability.

d. Resolution:

(1) electro-magnetic (EM) parameter measurement;

(2) antenna beam patterns;

(3) target resolution/range/bearing;

(4) frequency response; and

(5) narrow bandwidth frequency response.

e. Signature characteristics:

(1) resolving bandwidth;

(2) transmission bandwidth;

(3) receiving sensitivity;

(4) noise figure;

(5) of hostile signals; and

(6) transmitter/jammer.

f. Reliability/Availability:

(1) system reliability mean time between failures (MTBF)/availability.

g. Systems capability:

(1) number of targets;

(2) operational capability with respect to threat environment defined by current ELINT information;

(3) effective radiated power;

(4) duty factor;

(5) response time;

(6) modulation techniques for specific emitters; and

(7) modulation techniques not related to specific emitters.

h. Vulnerability to electronic counter-countermeasures (ECCM).

13. Operational test and evaluation data of the SLQ-32(V)2 revealing deficiencies in the system which have not yet been corrected are classified.

14. The following features of the hardware of the SLQ-32(V)2 are classified:

a. An external view of the hardware of the display control console with the system operating and with operational software installed.

b. An external view of the display control console with System Diagnostic Test (SDT) software or Operator Training Software (OTS) installed.

c. Systems operating (power on):

(1) operational software;

(2) SDT or OTS software installed;

(3) OTS software or source listing;

(4) operational software program package:

(a) threat library source listing;
(b) operational software source listing; and
(c) ECM data base (isolation data) listing.

15. Design, performance, and functional characteristics of the MK-92 Fire Control System are classified insofar as they pertain to the following:

a. Counter-countermeasure capability of the system;

b. Vulnerability of system radar sets to countermeasures;

c. System accuracy;

d. System radar set resolution and target discrimination;

e. Operating frequencies of system radar sets;

f. Pulse coding/spacing of system radar sets;

g. System speed velocity—maximum targets;

h. System capacity—threat configurations to exceed response capability;

i. System vulnerability to blast shock;

j. MK-92 computer tapes MOD 1, MOD 2, and MOD 5, when these tapes are associated with classified WS-8506.

16. Tactics developed for the operational use (military application) of the MK-92 Fire Control System are classified.

17. The operational readiness of the MK-92 Fire Control system is classified.

18. The following aspects of the MK-92 Fire Control Systems hardware are classified:

a. Transmitter, Radar T-1085, when the system assigned frequency determining crystals are installed;

b. Complete crystal sets, when specific operating frequencies are identified and the crystals are installed in the radar transmitter T-1085; and

c. Weapons control consoles (WCC) MK-106 Mods 0 and 1, and MK-107 MOD 1, when the WCC's are operating under the control of the AN/UYK-7 computer.

19. The mission of the Navy's Close-In Weapons System (CIWS), popularly known as the "Phalanx," is to provide—as part of a defense in depth—a fast reaction, terminal defense against low flying, high speed anti-ship missiles penetrating other fleet defense. The system is an automatic, self-contained unit consisting of a search and track radar, digitalized fire control system, and a 20MM M61A1 gun mounted in a single above-deck structure. The following features of the Close-In Weapons System are classified:

a. Threat analysis data and conclusions;

b. Vulnerability of radar;

c. Numerical frequency bandwidth;

d. Specific frequency;

e. Detection/acquisition range;

f. Pulse width and repetition rate;

g. Accuracy and kill probability;

h. Test results which reveal the effectiveness of the weapon;

i. System reaction time;

j. Tactics developed for the operation use of the system;

k. Material deficiency reports addressing performance or technical deficiencies in the system/program;

l. Reports addressing uncorrected deficiencies which reveal degrading or inability of the system/program to function as designed; and

m. Evaluations or assessments of uncorrected material deficiencies, which reveal degrading of the system/program.

20. Chaff is material that is launched from the ship and which forms a radar target as a decoy for a threatening anti-ship missile. USS STARK was equipped with MK-182 chaff rounds. Design, performance, and functional characteristics of the MK-182 chaff rounds are classified insofar as they pertain to:

a. Functional data pertaining to the effectiveness of the decoy against hostile missiles;

b. Chaff frequencies and sizes when associated with the warhead;

c. The specific amount of chaff by frequency or length;

d. Chaff dispersion, range tables and trajectories;

e. Threat analysis data and conclusions;

f. Operational planning data and tactics;

g. Placement envelope requirements;

h. Information concerning the warhead when loaded with the chaff;

i. Information concerning the chaff when associated with the warhead; and

j. Test results.

21. In addition to the classified nature of USS STARK's specific weapons systems, general technical information regarding the ship and her integrated operational capabilities are also classified. For example, the following areas have been classified:

a. Ship general plans and general arrangement drawings; and

b. Combat System Technical Operations Manuals.

22. I have considered carefully the classified aspects of the above described weapons systems and have concluded that these systems enhance considerably the national security of the United States. I have also concluded that public disclosure of the classified information involved in these systems could reasonably be expected to cause grave damage to the national security. Since military application is made of these systems, it is my opinion that disclosures of classified information concerning them in litigation would permit foreign powers to exploit weaknesses and to adopt specific counter-measures. Disclosure of such information would provide potential enemies of the United States with detailed information regarding the capabilities of these weapons systems and the USS STARK, which would aid them in identifying potential areas of military vulnerability which may exist in those systems and in that ship and similar types of ships. Such disclosures would therefore permit potential enemies to develop and employ diversionary or deceptive tactics and

counter-measures with increased confidence, and to construct offensive actions with greater confidence in the likely United States' technical response and defense to those actions. The knowledge gained through disclosure of the classified aspects of these systems would greatly assist foreign powers and organizations that are aligned against the United States. These conclusions are based on my personal review of the weapons systems described above and upon my personal estimates of the possible and probable effects of inappropriate disclosures of information relating to those systems.

23. The defensive weapons installed in the USS STARK represent significant advancements in technology over corresponding systems in earlier classes of ships. Disclosure of such information would be particularly harmful because of the large number of Oliver Hazzard Perry class frigates and other ships equipped with those defensive weapons, and the lengthy period of service expected of those ships.

24. Disclosure of the rules of engagement under which USS STARK operated would enable potential adversaries to predict more accurately the rules governing U.S. Navy ships in high threat environments. With such knowledge, an adversary could take action against an American vessel with greater assurance that an American response was prohibited, or could graduate its provocations, and time the massing of its forces, in a way calculated to disable the United States.

25. The civil actions before these courts are predicated upon the design, manufacture, testing, use and maintenance of weapons systems employed aboard the USS STARK. Considering the classified nature of that subject matter, the development of evidence during the course of discovery and presentation of that information at trial unavoidably will call for information which is classified. Specifically, classified information relating to the potential military uses of those weapons systems will be called

for, either directly or by a process of elimination. Even if the parties attempted to exclude requests for classified information, I believe there is a substantial risk such information would be released inadvertently. Accordingly, I view my responsibility to protect the national security as requiring that I invoke the extraordinary measure of asserting a formal claim of the State Secrets Privilege over any information which would indicate, directly or indirectly, the classified technical information concerning the weapons systems at issue.

26. I certify that it would prejudice the national security to disclose the particular classified facts concerning these systems and the rules of engagement and I have personally determined that the claims which I now assert in this declaration are appropriate under the circumstances.

27. Upon personal consideration of this matter, including the types of classified information which plaintiffs would require to provide their *prima facie* case, it is my determination that disclosure of such information would impair the national security of the United States.

28. For these reasons, I invoke the "states secrets" privilege and deny access to such information in this lawsuit.

29. I declare under penalties of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

5 September 1990

/s/ H. Lawrence Garrett III
H. LAWRENCE GARRETT, III
Secretary of the Navy